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Filing date: **06/27/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91221666
Party	Defendant MVS International Inc.
Correspondence Address	HUMBERTO RUBIO LAW FIRM OF RUBIO & ASSOCIATES PA 8950 SW 74TH CT STE 1804 MIAMI, FL 33156-3177 UNITED STATES hrubio@rubiolegal.com, frubio@rubiolawye
Submission	Opposition/Response to Motion
Filer's Name	Humberto Rubio
Filer's e-mail	hrubio@rubiolegal.com, frubio@rubiolegal.com
Signature	/humberto rubio/
Date	06/27/2016
Attachments	Response to Opposers Motion to Compel MVS 06 27 16.pdf(545346 bytes ) Ex A.pdf(20416 bytes ) Exhibit A.pdf(427436 bytes )

IN THE UNITED STATES PATENT & TRADEMARK OFFICE BEFORE  
THE TRADEMARK TRIAL AND APPEAL BOARD

Mark : AQUAFIX  
Applicant : MVS International Inc.  
Filed : September 3, 2014  
Published in  
the Official Gazette : December 30, 2014

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PEPSICO, INC.,

Opposer,

Opposition No. 91221666

v.

MVS INTERNATIONAL INC.,

Applicant.

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**APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO COMPEL APPLICANT'S  
DISCOVERY RESPONSES**

Applicant, MVS International, Inc., by and through their undersigned attorneys, hereby files its Response to Opposer's Motion to Compel Applicant's Discovery Responses and in support states as follows.

**INTRODUCTION**

Applicant, MVS INTERNATIONAL, INC. is a Florida closely held corporation. As with many smaller businesses, Mr. Iliopulos is the person in charge of most of the business operation and the person who creates and promotes all of its brands. As such, it researched and developed a plan for its AQUAFIX mark and applied for Trademark application Serial No. 86384378 for AQUAFIX in Class 32 on an *Intent to Use Basis*. Following publication, Opposer filed the current pending opposition proceeding.

Applicant is surprised by Opposer's position as Applicant has made diligent efforts to respond to the extensive and unduly burdensome discovery requests propounded by Opposer. Furthermore, Opposer has conveniently failed to point in its Motion to Compel and Declaration (under penalty of perjury), the fact that it has been in recent settlement communications with Applicant. *Enclosed as Exhibit A is call log between Applicant and Opposer and email exchange.* During these communications, Opposer failed to address the current Discovery issues it is now raising before the Board.

As recent as May 03, 2016, Applicant and Opposer had a 15 minute phone call in which both Applicant and Opposer discussed the possibility of reaching an amicable settlement. Prior calls were made in the months of February and March of 2016. However, Opposer made no mention to the filing of this motion. As such, Applicant was under the impression that the parties were actively negotiating a possible settlement and no Discovery requests were due at this time.

As further evidence of Applicant's willingness to work with Opposer and to avoid Board intervention, Applicant is serving Opposer with answers to *Opposer's Second Set of Interrogatories to Applicant* as well as a signed copy of *Applicant's First Request for Admissions*.

### **ARGUMENT**

Applicant has limited resources and time as it is a smaller business operation. Mr. Iliopulos is the person in charge of developing and promoting its brands. Notwithstanding the above, Applicant has made considerable efforts and provided Opposer with appropriate responses and objections to the numerous over-reaching discovery requests. Applicant has

amended and supplemented responses where the majority of responsive documents were produced by Applicant on November 13, 2015.

Moreover, Opposer has not complied with Trademark Rule 2.120(e)(1) which requires the movant on a motion to compel, to attest and show that a “good faith effort” to resolve the discovery dispute has been pursued. Here, Opposer sent only one email – dated March 18, 2016 - to Applicant and made no effort to contact Applicant by telephone to discuss the responses to discovery requests, prior to filing the present motion. Additionally, Opposer could have raised these issues in its May phone call with Applicant, but failed to do so. Therefore, the sending of one email does not rise to the level of a “good faith effort” to resolve the discovery dispute, especially when the parties have been in communications.

For this reason, the present motion should be denied.

### **CONCLUSION**

Applicant respectfully requests that the Board deny Opposer’s Motion to Compel Discovery.

Dated: June 27, 2016.

Respectfully submitted,

Law Firm of Rubio & Associates  
8950 SW 74th Court, Suite 1804  
Miami, Florida 33156  
Phone: 305 670 0323  
Fax: 305 670 0322  
Email: hrubio@rubiolegal.com

/s/Humberto Rubio  
Humberto Rubio, Jr.

Attorney for Applicant,  
MVS International Inc.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served via electronic mail and US Mail this 27<sup>th</sup> day of June, 2016 to PepsiCo, Inc., Paul Lee, Esq., 700 Anderson Hill Road ,Purchase, NY 10577, and BAKER BOTTS, LLC, Paul J. Reilly, Esq., Lauren Emerson, Esq., 30 Rockefeller Plaza, 44<sup>th</sup> FL., New York, New York 10112-4498.

Dated: June 27, 2016.

Respectfully submitted,

Law Firm of Rubio & Associates  
8950 SW 74th Court, Suite 1804  
Miami, Florida 33156  
Phone: 305 670 0323  
Fax: 305 670 0322  
Email: hrubio@rubiolegal.com

/s/Humberto Rubio  
Humberto Rubio, Jr.

Attorney for Applicant,  
MVS International Inc.

# EXHIBIT “A”

[Phone System](#)[Reports](#)[Call Log](#)[Billing](#)[Tools ▾](#)View: [Simple](#) | [Detailed](#)Show Call Log records for: ☐ Last 7 days ▾ ☒ From: 01/01/2016 To: 06/27/2016 [Show](#)[Open Advanced Features ▾](#)

Phone number: 914 253

[Contacts](#)[Block](#)[Delete](#)[Download](#)[Purge](#)

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<input type="checkbox"/>	Type	Phone Number	Name	Date / Time	Recording	Action	Result	Length
<input type="checkbox"/>		To: (914) 253-3443	PEPSICO INC	Tue 05/03/2016 4:55 PM		VoIP Call	Call connected	0:15:57
<input type="checkbox"/>		From: (914) 253-3443	PEPSICO INC	Tue 05/03/2016 2:15 PM		Phone Call	Accepted	0:01:46
<input type="checkbox"/>		From: (914) 253-3443	PEPSICO INC	Mon 05/02/2016 3:18 PM		Phone Call	Accepted	0:01:15
<input type="checkbox"/>		To: (914) 253-3443	PEPSICO INC	Thu 03/03/2016 5:43 PM		VoIP Call	Call connected	0:01:28
<input type="checkbox"/>		From: (914) 253-3443	PEPSICO INC	Tue 02/16/2016 5:29 PM		Phone Call	Voicemail	0:01:13

**From:** Lee, Paul {PEP} [<mailto:Paul.Lee@pepsico.com>]  
**Sent:** Thursday, March 3, 2016 9:42 AM  
**To:** Humberto Rubio <[h Rubio@rubiolegal.com](mailto:h Rubio@rubiolegal.com)>  
**Subject:** RE: Pepsico v. MVS

OK. I am available between 2:45 and 4:00 p.m. or between 4:30 and 6:00. Let me know what time works for you.

Paul

**Paul A. Lee** | Senior Director – Trademark Counsel | PepsiCo, Inc.  
700 Anderson Hill Road | Purchase, NY 10577  
Tel: 914.253.3443 | [paul.lee@pepsico.com](mailto:paul.lee@pepsico.com)

**From:** Humberto Rubio [<mailto:h Rubio@rubiolegal.com>]  
**Sent:** Thursday, March 03, 2016 9:18 AM  
**To:** Lee, Paul {PEP}  
**Subject:** Re: Pepsico v. MVS

Good morning,

I'll call you after 2:00pm when I get back to my office.

Regards,

Humberto Rubio

On Mar 2, 2016, at 6:33 PM, Lee, Paul {PEP} <[Paul.Lee@pepsico.com](mailto:Paul.Lee@pepsico.com)> wrote:

Humberto,

Just following up. Let me know when you are free to discuss.

Best regards,

Paul

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700 Anderson Hill Road | Purchase, NY 10577  
Tel: 914.253.3443 | [paul.lee@pepsico.com](mailto:paul.lee@pepsico.com)

**From:** Lee, Paul {PEP}  
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Humberto,



Thank you for the e-mail. I look forward to speaking with you as soon as you have some time to discuss. In the meantime, let me know if your client is agreeable to making changes to the mark to avoid any confusion with our AQUAFINA mark.

Best regards,

Paul

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Mr. Lee,

I owe you a phone call. We have been busy with federal court deadlines. I expect to call you by the end of this week, early next week (the latest). Thank you.

Regards,

**Humberto Rubio, Jr., Esq.**  
Law Firm of Rubio & Associates, P.A.  
Town Center One  
8950 SW 74 Ct., Suite 1804  
Miami, FL 33156  
Tel: (786) 220-2061  
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